

IN THE SUPREME COURT OF THE STATE OF NEVADA

WPH ARCHITECTURE, INC., a)
Nevada Corporation,)
)
Appellant,)
)
vs.)
)
EIGHTH JUDICIAL DISTRICT)
COURT and THE HONORABLE)
JESSIE WALSH,)
)
Respondent,)
)
and)
)
VEGAS VP, LP, a Nevada Limited)
Partnership,)
)
Real Party in Interest.)

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REPLY BRIEF

APPELLANT, WPH ARCHITECTURE, INC.'S
REPLY BRIEF

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1 **APPELLANT WPH ARCHITECTURE INC.'S REPLY BRIEF**

2 **I. INTRODUCTION**

3 COMES NOW Appellant WPH ARCHITECTURE, INC. ("WPH"), by and through its
4 counsel of record, and submits this Reply Brief pursuant to Nevada Rules of Appellate
5 Procedure ("NRAP") Rule 28(c). Real Party in Interest/Respondent, Vegas VP, LP ("Vegas
6 VP") misses the mark in its Answering Brief. Vegas VP's primary argument – that only Nevada
7 "substantive" law applied to the parties' dispute – is impractical and disingenuous. Yes, the
8 parties' agreement provided that their disputes be submitted to mediation and, if unsuccessful, to
9 the American Arbitration Association ("AAA").¹ However in that very same written agreement,
10 *the parties separately agreed that Nevada law would apply to their dispute.*² The relevant
11 contractual provision does not limit the applicable law to Nevada "substantive" law and in fact
12 modifies the AAA Rules to include Nevada "procedural" law. In other words, *all* Nevada law
13 applied to the parties' dispute.

14 As set forth in WPH's Opening Brief, Nevada's offers of judgment statutes as set forth in
15 Nevada Rules of Civil Procedure ("NRCP") 68 and Nevada Revised Statutes ("NRS") 17.115
16 are substantive rather than procedural law. In its Answering Brief, Vegas VP misconstrues this
17 Court's passing mention of Nevada's offers of judgment statutes contained in *dicta* in *Tipton*.
18 Whether NRCP 68 or NRS 17.115 are substantive rather than procedural law is a matter of **first**
19 **impression** before this Court, although federal courts applying Nevada law have uniformly ruled

21 ¹ WPH Architectural Agreement[WPH Appendix, Vol.1a, Tab I, Exh.11, ¶ 7.1, Bates No. WPH201]

22 ² WPH Architectural Agreement[WPH Appendix, Vol.1a, Tab I, Exh.11, ¶ 9.1, Bates No. WPH203]

1 that such statutes are substantive.³ However, *even if* either NRCP 68 *or* NRS 17.115 is deemed
2 to be “procedural” both statutes would still apply for the reasons set forth herein.

3 It is impractical for Vegas VP to suggest that the AAA Rules governed every facet of the
4 procedural matters in the parties’ dispute, when Vegas VP admits that Nevada procedural law
5 governed at least discovery. In the underlying arbitration, Vegas VP’s (and the AAA Arbitration
6 Panel (“the Panel”)) course of conduct throughout the duration of the dispute was to cite, apply
7 and rely upon *both* Nevada substantive and procedural law.

8 In fact, and as set forth in detail below, on *multiple* occasions Vegas VP itself requested
9 relief from the Panel pursuant to both the Nevada Rules of Civil Procedure and the Nevada
10 Revised Statutes, including: (i) a request for sanctions against WPH pursuant to NRCP 37; (ii)
11 an award of prejudgment interest pursuant to NRS 99.040; and (iii) a request that one of Vegas
12 VP’s percipient witnesses not be excluded from testifying pursuant to the Nevada Rules of
13 Evidence and as set forth in NRS §§ 50.025(1)(a) and 50.265(1).

14 For the sake of argument, *even if* the choice-of-law provision in the parties’ agreement
15 only provides authority for Nevada substantive law to apply, Vegas VP has effectively waived
16 any argument that Nevada procedural law did not likewise apply. It is notable that Vegas VP did
17 not object to *either* of WPH’s statutory offers of judgment (“Statutory Offers”) as improperly
18 imposing the Nevada Rules of **Civil Procedure** and the Nevada Revised Statutes upon the
19 parties in this dispute or otherwise. Rather, Vegas VP merely ignored WPH’s Statutory Offers
20

21 ³ See *McMahan v. Toto*, 256 F.3d 1120 (11th Cir. 2001); *MRO Communications, Inc. v.*
22 *American Tel. & Tel. Co.*, 197 F.3d 1276 (9th Cir. 1999).

1 and rejected them by operation of law. Thus, not only has Vegas VP waived any argument that
2 Nevada procedural law is inapplicable to the dispute, but by its own course of conduct, Vegas
3 VP has essentially consented, ratified and approved the governance of *both* substantive and
4 procedural Nevada law to the dispute. Furthermore, not once during the underlying arbitration
5 did Vegas VP ever identify any conflict between an AAA Rule and either the Nevada Rules of
6 Civil Procedure or the Nevada Revised Statutes. Therefore, both Nevada procedural and
7 substantive unquestionably law applied to the parties' dispute.

8 Accordingly, the Panel had the authority and jurisdiction to grant WPH's Post-Award
9 Motion but failed to award WPH, as a matter of right, its attorney's fees, costs and interest
10 pursuant to applicable Nevada law, including Nevada's offers of judgment statutes as set forth in
11 NRCP 68 and NRS 17.115. The Panel manifestly disregarded the law by making errors that
12 were obvious and capable of being readily and instantly perceived by a reasonably prudent
13 arbitrator. When WPH motioned the District Court to modify and/or vacate the Panel's award,
14 the District Court was obligated to award costs to WPH pursuant to its Statutory Offers and it
15 was an abuse of discretion not to award attorney's fees to WPH pursuant to its Statutory Offers.
16 Thus, this Court should reverse the District Court's denial of WPH's District Court Motion.

17 **II. VEGAS VP'S ARGUMENT THAT ONLY NEVADA SUBSTANTIVE LAW**
18 **APPLIED TO THE ARBITRATION PROCEEDINGS IS IMPRACTICAL AND**
DISINGENUOUS

19 Vegas VP urges this Court to consider that the parties agreed to the application of the
20 AAA Rules to govern their dispute, and that those rules be applied in a vacuum. Such a position
21 is impractical as the AAA Rules did not and could not govern every facet of the parties' dispute.

1 Recall, Vegas VP engaged WPH to perform architectural services pursuant to a written
2 contract ("Architectural Agreement"), which provides: "This Agreement shall be governed by
3 the law of the principal place of business of the Architect."⁴ WPH's principal place of business
4 is Las Vegas, Nevada.⁵ The Architectural Agreement further required the parties to submit their
5 disputes to mediation, and, if unsuccessful, to AAA arbitration rather than litigation.⁶

6 In its Answering Brief, Vegas VP attempts to excise Nevada procedural law from the
7 choice of law provision in the Architectural Agreement. However, it would be impractical for
8 *solely* the AAA rules to govern the dispute, as Vegas VP admits that Nevada procedural law
9 governed at least discovery. In any event, the parties agreed to modify and depart from the AAA
10 Rules, *in writing*. The parties separately agreed in the Architectural Agreement that Nevada law
11 would apply.⁷ Rule R-1 of the AAA Rules provides, "The parties shall be deemed to have made
12 these rules a part of their arbitration agreement...The parties, by written agreement, may vary the
13 procedures set forth in these rules..."⁸ Thus, the Parties mutually agreed, both expressly and
14 through their course of conduct (further detailed below) that Nevada substantive and procedural
15 law would govern their dispute. Therefore, it must follow that Nevada procedural law be
16 applied *in addition* to the AAA Rules. Notably, there are no AAA Rules which conflict with
17 Nevada's offers of judgment statutes as set forth in NRCP 68 and NRS 17.115.

18 Furthermore, it is disingenuous for Vegas VP to suggest that only Nevada substantive law
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20 ⁴ WPH Architectural Agreement[WPH Appendix, Vol. 1a, Tab I, Exh. 11, ¶ 9.1, Bates No. WPH203]

⁵ Declaration of Douglas Walton[WPH Appendix, Vol. 1a, Tab I, Exh. 12, ¶ 2, Bates No. WPH 213]

21 ⁶ WPH Architectural Agreement[WPH Appendix, Vol. 1a, Tab I, Exh. 11, ¶ 7.1, Bates No. WPH201]

⁷ WPH Architectural Agreement[WPH Appendix, Vol. 1a, Tab I, Exh. 11, ¶ 9.1, Bates No. WPH203]

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1 applied to the arbitration proceedings. Vegas VP, on multiple occasions, itself requested relief
2 from the Panel pursuant to the Nevada Rules of Civil Procedure and the Nevada Revised
3 Statutes, which Vegas VP now argues are merely procedural and not applicable to the
4 arbitration proceedings.

5 First, on August 25, 2008, in the underlying arbitration, Vegas VP (unsuccessfully)
6 motioned the Panel to compel WPH's discovery responses pursuant to the NRCP 37.⁹ In its
7 motion, Vegas VP additionally requested that the Panel award attorney's fees in its favor and
8 against WPH.¹⁰ Therein, and pursuant to and based on NRCP 37, Vegas VP demanded that,
9 "The Panel must step in to correct this conduct."¹¹

10 Second, on October 24, 2008, Vegas VP submitted to the Panel a Response to WPH's
11 Special Briefing Re: Architectural Standard of Care Opinions.¹² The first point of Vegas VP's
12 Response is a request that the Panel not exclude one of Vegas VP's witnesses, Mr. Gary Leach,
13 from testifying at the arbitration hearing.¹³ In support of this proposition, Vegas VP set forth
14 the following:

15 "The Nevada Rules of Evidence expressly permit an individual to testify about facts
16 within the witness's own personal knowledge, even if those facts are within the witness's
17 opinion on a particular subject. NEV. REV. STAT. § 50.265(1). Mr. Leach's testimony
18 will be admissible *under the evidence rules*...So long as his testimony is based upon
19 facts within his personal knowledge, Mr. Leach may testify as a fact witness without
20 limitation. *Id.* § 50.025(1)(a). Should Mr. Leach stray from *the strictures of the rules*,

21 ⁸ See AAA Rule R-1(a) [WPH Appendix, Vol. 2, Tab IV, Bates No. WPH 490.]

22 ⁹ Vegas VP's Motion to Compel [WPH Appendix, Vol. 1a, Tab I, Exh. 4, Bates Nos. WPH55-61]

¹⁰ Vegas VP's Motion to Compel [WPH Appendix, Vol. 1a, Tab I, Exh. 4, ¶ 1, Bates No. WPH55]

¹¹ Vegas VP's Motion to Compel [WPH Appendix, Vol. 1a, Tab I, Exh. 4, ln 28, Bates No. WPH56]

¹² Vegas VP Response Brief [WPH Reply Appendix, Vol. 1, Tab III, Bates Nos. WPH555-558]

¹³ Vegas VP Response Brief [WPH Reply Appendix, Vol. 1, Tab III, ln 5-18, Bates Nos. WPH556]

1 the Panel may exclude his testimony in response to a timely objection by WPH's
2 Counsel..."¹⁴ (emphasis added)

3 Third, on January 7, 2009 (approximately two months *after* the arbitration hearing¹⁵),
4 counsel for Vegas VP specially contacted the Panel and all counsel in an email, specifically
5 noting the following:

6 "This is just to notify the panel that the prejudgment interest rate changed on January 1,
7 2009 to 5.25% (prime of 3.25% plus 2.00%). See Attached. My understanding is that
8 *under Nevada law*, any prejudgment interest runs from the date the demand for
9 arbitration was served, which would have been 8/13/07."¹⁶ (emphasis added)

10 Counsel for Vegas VP attached to that correspondence a schedule of values of Nevada
11 prime interest rates, and the schedule itself quoted and cited NRS 99.040(1) (which regards
12 applicable annual interest rates).¹⁷ Vegas VP obviously had every intention of seeking an award
13 of prejudgment interest against WPH *after* the Panel's Award, yet now, Vegas VP argues that
14 the Nevada Revised Statutes are merely "procedural" and were thus inapplicable.

15 Essentially, Vegas VP has the audacity to (i) request an award attorney's fees as
16 sanctions against WPH pursuant to the Nevada Rules of Civil Procedure, (ii) request that
17 the Panel allow one of its witnesses to testify pursuant to the Nevada Rules of Evidence,
18 (iii) request an award of prejudgment interest against WPH pursuant to the Nevada
19 Revised Statutes, and, *in the same breath*, disclaim that Nevada law applied in the
20 underlying arbitration dispute. Because the parties agreed to modify the AAA Rules *in*

21 ¹⁴ Vegas VP Response Brief [WPH Reply Appendix, Vol. 1, Tab III, ln 9-17, Bates Nos. WPH556]

22 ¹⁵ See Affidavit of Jean A. Weil [WPH Appendix, Vol. 1a, Tab I, ¶ 2, Bates No. WPH 2.]

¹⁶ Vegas VP Correspondence [WPH Appendix, Vol. 1a, Tab I, Exh. 13, Bates Nos. WPH216]

¹⁷ Prime Interest Rate Sheet [WPH Appendix, Vol. 1a, Tab I, Exh. 13, Bates Nos. WPH217]

1 *writing* to include the application of Nevada law and because Vegas VP's course of conduct
2 throughout the duration of the dispute was to cite, apply and rely upon *both* Nevada substantive
3 and procedural law, it is clear that Vegas VP consented to the application of the Nevada Rules of
4 Civil Procedure and the Nevada Revised Statutes and thus both were applicable to the
5 underlying arbitration.

6 Vegas VP has affirmatively *waived* any argument that Nevada procedural law did not
7 apply to the arbitration proceedings. It is clear from Vegas VP's Answering Brief that Vegas VP
8 does not object to the application of Nevada case law to the parties' dispute. Rather, Vegas VP
9 now contends that Nevada procedural law was inapplicable. This Court held that "...the waiver
10 of a right may be inferred when a party engages in conduct so inconsistent with an intent to
11 enforce the right as to induce a reasonable belief that the right has been relinquished." (*Nevada*
12 *Yellow Cab Corp. v. Eighth Judicial Dist. Court*, 123 Nev. 44, 29, 152 P.3d 737, 740 (2007).)

13 Vegas VP did not object to *either* of WPH's statutory offers of judgment ("Statutory
14 Offers") as improperly imposing the Nevada Rules of Civil Procedure and the Nevada Revised
15 Statutes upon the parties in this dispute or otherwise. Further, during all briefing in the
16 arbitration proceedings, the parties (and the Panel) were provided with an Addendum consisting
17 of all law, both substantive and procedural, that each party was relying on in support of its
18 particular brief.¹⁸ Vegas VP, with notice of the Nevada substantive and procedural law being
19 asserted and applied in the arbitration, never objected to the application of such law. Not once
20 during the underlying arbitration did Vegas VP ever identify any conflict between an AAA Rule
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1 and either the Nevada Rules of Civil Procedure or the Nevada Revised Statutes. Vegas VP's
2 behavior in this regard amounting to such a waiver is further confirmed and noted in the AAA
3 Rules themselves.¹⁹ This is not a case where WPH is attempting to "rewrite the contract" and
4 obtain special treatment through review of the Nevada Rules of Civil Procedure and the Nevada
5 Revised Statutes. WPH is merely seeking satisfaction of its rights under that law which was
6 applicable to the arbitration proceedings. Therefore, as set forth above, not only has Vegas VP
7 waived any argument that Nevada procedural law is inapplicable to the dispute, but by its own
8 course of conduct, Vegas VP has essentially consented, ratified and approved the governance of
9 *both* substantive and procedural Nevada law to the parties' dispute.

10 **III. NEVADA'S OFFERS OF JUDGMENT STATUTES ARE SUBSTANTIVE,**
11 **RATHER THAN PROCEDURAL LAW, BUT ARE NONETHELESS**
12 **APPLICABLE TO THIS DISPUTE EVEN IF THIS COURT HOLDS THAT THE**
13 **OFFERS OF JUDGMENT STATUTES ARE PROCEDURAL IN NATURE**

14 It is important to first note that the Panel itself made no pronouncement as to whether if
15 either of Nevada's offers of judgment statutes as set forth in NRCP 68 and NRS 17.115 were
16 "procedural," rather than substantive in nature, that such statutes would have been inapplicable.
17 Rather, the Panel failed to award WPH its attorney's fees and costs because the Panel did not
18 believe it had express authority to do so. As set forth above, both substantive and procedural

19 ¹⁸ See Addendums of Cited Authority [WPH Reply Appendix, Vol.1, Tab II and Tab V]

20 ¹⁹ In its Answering Brief, Vegas VP directed this Court to a Web site for the current AAA
21 Rules (<http://www.adr.org/sp.asp?id=22004>, which, ostensibly, were not those in effect during
22 the dispute). AAA Rule R-37, regarding "Waiver of Rules" provides the following: "Any party
who proceeds with the arbitration after knowledge that any provision or requirement of these
rules has not been complied with and who fails to state an objection in writing shall be deemed
to have waived the right to object."

1 Nevada law applied to this dispute. In its Answering Brief, it is uncertain whether Vegas VP is
2 alleging that the Nevada Revised Statutes are procedural or substantive rules. Regardless, as set
3 forth in WPH's Opening Brief, both NRCP 68 and NRS 17.115 are substantive in nature, as they
4 allow for recovery of attorney's fees, and they should be applied regardless of forum.

5 Vegas VP argues that the case of *Tipton v. Heeren*, 109 Nev. 920, 859 P.2d 465 (1993)
6 holds that Nevada's offers of judgment statutes are procedural rather than substantive Nevada
7 law. *Tipton* is distinguishable first in the fact that this Court's primary focus was whether Tipton
8 qualified to become a holder in due course and secondly whether Tipton obtained a judgment
9 more favorable than the settlement offer. (*Id.*) In other words, whether or not NRCP 68 or NRS
10 17.115 were procedural or substantive in nature was not a central issue in the case. In *Tipton*,
11 this Court made no specific pronouncement that either NRCP 68 or NRS 17.115 was
12 "procedural" law. Rather, from a footnote in the case, it appears that *the parties had already*
13 *agreed* that pursuant to a promissory note containing a choice of law provision that Wyoming
14 law would apply as to whether Tipton constituted a holder in due course, while Nevada law
15 would apply to the statutory offers of judgment, and this Court abided by that determination.
16 (*Id.* at fn3.) The language in the particular choice-of-law provision in the promissory note was
17 not set forth in the Court's opinion. Further distinguishable is the fact that this Court in *Tipton*
18 made no pronouncement regarding NRCP 68 or NRS 17.115 in an arbitral setting, as the opinion
19 concerned parties that initiated their dispute in a Nevada tribunal.

20 Notably, in *Tipton*, the offeror sought fees and costs pursuant to Nevada's statutory offers
21 of judgment *after* judgment was entered in his favor. Here, WPH proceeded similarly, in that
22

1 WPH motioned the Panel after the Award for its fees and costs pursuant to NRCP 68 and NRS
2 17.115. The rationale here is similar to that in *Tipton* – until the Panel issued its Award in favor
3 of WPH, WPH had no right or basis to request attorney’s fees or costs. Therefore, because
4 Nevada’s offers of judgment statutes involve rights to attorney’s fees, which are substantive
5 rights, this Court should recognize that both NRCP 68 and NRS 17.115 constitute substantive
6 law. By *requiring* a party to pay the another’s fees pursuant to a rejected statutory offer, the
7 Nevada legislature clearly intended to influence “substantive” outcomes. However, regardless
8 of how this Court classifies these rules, neither NRCP 68 nor NRS 17.115 conflict with AAA
9 Rules and both were applicable to the arbitration proceedings for the reasons set forth above.

10 **IV. DESPITE VEGAS VP’S ARGUMENT, WPH WAS CLEARLY THE**
11 **PREVAILING PARTY AND SHOULD HAVE RECOVERED ITS ATTORNEY’S**
12 **FEES UNDER NRS 18.020**

13 WPH was clearly the prevailing party of the arbitration, as it avoided an adverse
14 judgment. WPH did not “lose” its Counterclaim. The Counterclaim was dismissed long prior to
15 the arbitration hearing upon which the Award was based on. WPH’s Counterclaim was not
16 litigated on the merits and did not factor into the Panel’s decision not to award WPH attorney’s
17 fees and costs.²⁰ Vegas VP cannot conceivably construe itself as the prevailing party because it
18 lost on the merits on all of its claims before the Panel at the arbitration hearing. Further, the
19 Panel made an *express* determination that WPH was the prevailing party, but then stated that the
20 underlying papers and pleadings would not “likely” entitle attorney’s fees under NRS 18.010.²¹

21 ²⁰ Order Re: Post-Award Motion [WPH Appendix, Vol. 1a, Tab I, Exh. 9, Bates No. WPH179-182]

22 ²¹ Order Re: Post-Award Motion [WPH Appendix, Vol. 1a, Tab I, Exh. 9, ln. 6, Bates No. WPH180]

1 No mention was made by the Panel of WPH's request for attorney's fees under NRS 18.020.

2 Thus, since WPH was clearly the "prevailing party," (and further for the reasons set forth in its
3 Opening Brief) WPH should have recovered attorney fees under NRS 18.020.

4 **V. THE PANEL RETAINED JURISDICTION TO RULE ON WPH'S POST-AWARD**
5 **MOTION AFTER IT ISSUED ITS AWARD**

6 Despite Vegas VP's assertions, the Award was not a "final" arbitration award by the
7 Panel. Nowhere in the Award is the word "final."²² The Panel's jurisdiction was only
8 terminated *after* it made its Ruling.²³ In its Answering Brief, Vegas VP argues that WPH had
9 not raised the issue of entitlement to attorney's fees prior to the issuance of the Panel's Award,
10 which precluded the Panel from awarding fees under the AAA Rules. This is unsupported and
11 not found in the Order on WPH's Post-Award Motion. Further, if the Panel did not have the
12 jurisdiction to decide WPH's Post-Award Motion, why would it request evidence of WPH's
13 costs, receipts and fee entries through a Supplemental Briefing?²⁴ The Panel's Award made
14 clear that it was not a final award, and the Order on WPH's Post-Award Motion made it clear
15 that only *after* the Order was entered was the Panel's jurisdiction terminated.²⁵

16 **VI. WPH'S POST-AWARD MOTION REGARDING OFFERS OF JUDGMENT WAS**
17 **TIMELY AND PROPER**

18 WPH raised the issue of Vegas VP's rejection of WPH's Statutory Offers after the Panel
19 had made its Award but before the Panel terminated its jurisdiction over the parties' dispute.
20 This is typically how the issue would have been brought to light in a trial setting, and as it was in

21 ²² See Panel's Award [WPH Appendix, Vol. 1a, Tab I, Exh. 1, Bates Nos. WPH 11-24.]

22 ²³ Order Re: Post-Award Motion [WPH Appendix, Vol. 1a, Tab I, Exh. 9, ln. 25, Bates No. WPH 181]

²⁴ See Affidavit of Jean A. Weil [WPH Appendix, Vol. 1a, Tab I, ¶¶ 18-19, Bates No. WPH 4.]

1 *Tipton*. Again, WPH raised this issue *before* the Panel had issued any “final” award. The claims
2 in WPH’s Post-Award Motion were proper, as no claim to attorney’s fees and costs pursuant to
3 WPH’s Statutory Offers had been decided at the hearing. Any applicable limitation of the
4 Panel’s post-Award review would be restricted to claims which had already been decided.²⁶

5 Despite the assertions by Vegas VP, nowhere in the Panel’s Award does the Panel state
6 that WPH’s act of revealing its Statutory Offers after the Award precluded the Panel from
7 awarding WPH’s its fees and costs. Rather, the Panel’s stated reasoning was that the Panel did
8 not believe it had express authority to do so while at the same time ignoring such authority.
9 Notably, Vegas VP did not suffer any prejudice by the timing of WPH’s Post-Award Motion,
10 nor does Vegas VP argue same in its Answering Brief.

11 From a strategy standpoint, WPH should not be required to divulge to the Panel its pre-
12 award offers of judgment in order to eventually obtain its fees and costs. Why should WPH
13 have had to disclose its statutory offers of judgment to Vegas VP prior to the Award, and thus
14 provide the Panel (who would later be hearing all evidence and making an award) with a
15 negative inference of WPH’s potential liability near the outset of the dispute? The answer is
16 clear. WPH was not obligated to disclose to the Panel its prior Statutory Offers which could
17 have served to prejudice WPH and predispose the Panel towards a finding of fault. WPH’s Post-
18 Award Motion was thus timely and proper.

19 ////
20

21 ²⁵ Order Re: Post-Award Motion [WPH Appendix, Vol. 1a, Tab I, Exh. 9, ln. 26, Bates No. WPH181]

22 ²⁶ See AAA Rule R-47 [WPH Appendix, Vol. 2, Tab IV, Bates No. WPH 491.]

1 **VII. STATUTORY AND COMMON LAW GROUNDS EXIST FOR THIS COURT TO**
2 **VACATE, CORRECT AND/OR MODIFY THE PANEL'S AWARD**

3 As stated in WPH's Opening Brief, both statutory and common law grounds exist to
4 vacate or modify arbitration awards. As to statutory law, under NRS 38.241(1)(d), an arbitration
5 award can be vacated by the District Court if "an arbitrator exceeds his powers." As previously
6 mentioned in the Opening Brief, the Panel exceeded its powers by affirmatively negating
7 applicable Nevada law in making its Award. Vegas VP's Answering Brief ignores this fact.

8 As to the common law grounds, Vegas VP cites a recent case which it purports defines
9 the "manifest disregard of the law" standard for vacatur of arbitration awards differently than the
10 standard in the Opening Brief. (see *Lagstein v. Certain Underwriters at Lloyd's, London*, 607
11 F.3d 634 (9th Cir. 2010).) Notably, the *Lagstein* case was based on the Federal Arbitration Act,
12 not Nevada's Uniform Arbitration Act, which is interpreted differently by federal courts
13 regarding vacatur of arbitration awards. In fact, federal courts recognize an additional common
14 law ground for vacatur of arbitration awards – when the arbitrators' awards are "completely
15 irrational." (*Id.* at 4.) As stated previously, the Panel manifestly disregarded the law by
16 consciously ignoring the fact that Nevada law applied to the dispute, despite the parties' express
17 terms in the Architectural Agreement and despite the fact that the Panel and the parties cited,
18 relied upon and applied all aspects of Nevada law during the entire course of the case.

19 An award is "completely irrational" when an arbitrator's decision fails to draw its essence
20 from the pertinent agreement. (*Id.*) Here, the pertinent agreement is the Architectural
21 Agreement. The Order denying WPH its fees and costs is completely irrational, because even in
22 light of the Architectural Agreement's language providing that the applicable law was that of the

1 State of Nevada, the Panel *still* failed to apply Nevada law. Express authority for the Panel to
2 award WPH its fees and costs was applicable, but was ignored by the Panel. Ironically, this
3 ruling came from the very same Panel that continually cited, relied upon and applied Nevada
4 law. This is dichotomy completely irrational especially as to the application of NRS 38.238.

5 The Panel ignored and failed to make mention, whatsoever, of NRS 38.238 in its Order
6 on WPH's Post-Award Motion, despite the fact that WPH pointed out to the Panel that the
7 statute provided *express* authority for the Panel to award WPH its fees and costs in the
8 arbitration pursuant to its rejected Statutory Offers.²⁷ In addition, the Panel was compelled to
9 honor the Architectural Agreement among the parties, which stated that Nevada law was
10 applicable. Thus, even though NRS 38.238 may read as allowing a discretionary award of fees,
11 **here both a statute and a contract were involved to compel the Panel to follow Nevada law**
12 **(including NRCP 68 and NRS 17.115) and therefore an award of reasonable attorney's fees and**
13 **costs to WPH was mandatory.** Vegas VP improperly attempts to read the comments to NRS
14 38.238 into the statute. Nothing in the statute "requires" that attorney's fees be an entitlement
15 based on the "substantive nature" of a claim. Again, Vegas VP and WPH agreed in the
16 Architectural Agreement that NRS 38.238, NRCP 68 and NRS 17.115 provide authority for an
17 award of attorney's fees and costs to a party in their dispute. In sum, under either standard, the
18 Panel manifestly disregarded applicable law and was completely irrational in, on the one hand,
19 continually citing, relying upon and applying Nevada law in the underlying prehearing and post-
20 hearing briefing, and on the other hand, failing to take abide by the language in the Architectural

1 Agreement providing that the applicable law was that of the State of Nevada.

2 **VIII. CONCLUSION**

3 The Panel clearly had enough information to determine that (i) WPH's Statutory Offers
4 were reasonable in light of Vegas VP's claims; (ii) Vegas VP's rejection of *both* of WPH's
5 Statutory Offers was unreasonable; and (iii) the fees sought by WPH were reasonable and
6 justified. However, the Panel did not consider these factors and instead chose to ignore and
7 disregard clear, express and applicable law as it regarded an award of attorney's fees and costs
8 pursuant to WPH's Statutory Offers under NRCP 68 and NRS 17.115. The Panel was clearly
9 looking to this Court to make an express and unequivocal pronouncement that statutory offers of
10 judgment are applicable to arbitration proceedings, as they should be. For this reason, and the
11 reasons set forth above and in WPH's Opening Brief, this Court should reverse the District
12 Court's denial of WPH's District Court Motion, hold that NRCP 68 and NRS 17.115 apply to
13 arbitration proceedings and remand this matter back to the district Court for an order that Vegas
14 VP pay WPH its attorney's fees and costs.

15 DATED this 19th day of July, 2010.

WEIL & DRAGE, APC

16
17 By: 

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22 ²⁷ Reply Re: Post-Award Motion [WPH Appendix, Vol. 1a, Tab I, Exh. 7, Bates Nos. WPH106-107]